IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CURTIS VINCENT POWELL, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12187 Trial Court No. 3AN-12-12589 CR MEMORANDUM OPINION No. 6662 — August 1, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Larry D. Card, Judge.

Appearances: Douglas O. Moody, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge MANNHEIMER.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

A jury found Curtis Vincent Powell guilty of felony driving under the influence, felony refusal to take a breath test, and sixth-degree controlled substance misconduct.

At trial, Powell asserted that he was not guilty of driving under the influence because, even though he was impaired, his impairment arose through unwitting intoxication. Specifically, Powell asserted that someone spiked his can of soda without his knowledge, and that he could not reasonably have known that the liquid he was drinking was an intoxicant. [1]

On appeal, Powell contends that the jury was misinstructed regarding his defense of unwitting intoxication.

The prosecutor, the defense attorney, and the judge all agreed that it was the State's duty to prove, beyond a reasonable doubt, that Powell was at least negligent regarding the possibility that the liquid he was drinking was an intoxicant (or, alternatively, that Powell came to realize his impairment and nonetheless continued to drive). The judge and the parties crafted the following jury instruction, which was intended to describe this point of law:

> Under Alaska law, to prevail on a charge of driving while intoxicated, the state must prove that the defendant knowingly ingested intoxicants. This means that it is a defense to the charge of driving under the influence that the ingestion of the intoxicants was unwitting. The defendant has raised this defense. Therefore, in addition to proving each of the elements [of driving under the influence] beyond a reasonable doubt, the State must also prove that the defendant did not knowingly ingest the intoxicant beyond a reasonable doubt, either by proving that the defendant acted

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[1] *See Solomon v. State*, 227 P.3d 461, 467-68 (Alaska App. 2010) (recognizing the defense of unwitting intoxication to a charge of driving under the influence).

> at least negligently or by proving that the defendant came to realize their impairment but continued to drive.

On appeal, Powell points out that the final sentence of this instruction actually says the opposite of what everyone intended. This final sentence says that it is the State's duty to prove "that the defendant *did not* knowingly ingest the intoxicant" — when, in fact, the drafters of the instruction meant to say that it was the State's duty to prove that the defendant *did* knowingly ingest the intoxicant.

As is common when people are reading text with an expectation of what the text is supposed to say, neither the lawyers nor the trial judge caught this miswording — even when the judge read the instruction aloud to the jury at the end of the trial. Thus, there was no objection to the jury instruction in the trial court. But now, on appeal, Powell argues that the miswording of the instruction requires reversal of his conviction for driving under the influence.

Because this claim is raised as a point of plain error, Powell must show that the miswording of the instruction "obviously created a high likelihood that the jury would follow an erroneous theory[,] resulting in a miscarriage of justice." *Patterson v. Cox*, 323 P.3d 1118, 1121 (Alaska 2014). Here, we agree with the State that the miswording of the jury instruction was harmless.

In their summations to the jury, both the prosecutor and the defense attorney told the jury that it was the State's burden to prove, beyond a reasonable doubt, that Powell knowingly ingested the intoxicating liquid, and that Powell was at least negligent with respect to the possibility that the liquid was, indeed, an intoxicant.

As both the Alaska Supreme Court and this Court have recognized, the arguments of counsel can cure ambiguities or flaws in the jury

instructions.[2] Given the record in Powell's case, there is no reason to believe that the jurors were misled on this point, or that they failed to hold the State to its burden of disproving Powell's claim of unwitting intoxication.

In a separate claim on appeal, Powell argues that the judge who sentenced him was working under the mistaken impression that 2 years of Powell's sentence for felony breath-test refusal had to be imposed consecutively to his sentence for felony driving under the influence. In fact, the law only required that the sentences be consecutive to the extent of Powell's 240-day mandatory minimum sentence for felony breath-test refusal. *See* AS 28.35.032(p)(5); *Baker v. State*, 30 P.3d 118, 120 (Alaska App. 2001).

The State concedes error and agrees that Powell must be re-sentenced. This concession of error is supported by the record and the law. We therefore direct the superior court to re-sentence Powell.

Finally, Powell contends that the sentencing judge improperly infringed his constitutional right of family association when the judge imposed a condition of probation that barred Powell from having any contact with his mother and his brother. Because Powell's attorney did not object to this probation condition in the trial court, Powell must now show plain error. *State v. Ranstead*, __ P.3d __, 2018 WL 1660862 at *3-4 (Alaska 2018).

The record demonstrates ample reason to restrict Powell's contact with these two relatives: both of them were major drug dealers. But when a probation condition infringes a defendant's constitutional rights, the sentencing judge must employ special scrutiny to make sure that the probation condition is narrowly tailored so as to

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[2] *Todeschi v. Sumitomo Metal Mining Pogo, LLC*, 394 P.3d 562, 579 (Alaska 2017); *Riley v. State*, 60 P.3d 204, 208 (Alaska App. 2002); *Norris v. State*, 857 P.2d 349, 355 (Alaska App. 1993).

avoid interfering unnecessarily with the defendant's constitutional rights. In such instances, the sentencing judge must "affirmatively consider, and have good reason for rejecting, any less restrictive alternatives." *Glasgow v. State*, 355 P.3d 597, 600 (Alaska App. 2015). [3]

In Powell's case, the record gives no indication that the sentencing judge affirmatively considered narrower measures that might satisfy the goals of probation while still preserving Powell's relations with his family — alternatives such as allowing Powell to have contact with his mother and brother if that contact was supervised by his probation officer (or by someone designated by the probation officer).

However, as our supreme court held in *Ranstead*, if no party objects to a proposed condition of probation, and if the sentencing court has "conducted its own review of the condition and [has] found nothing evidently problematic", then the sentencing court "need not address an uncontested condition [of probation] on the record." *Ranstead*, 2018 WL 1660862 at *4.

Thus, *Ranstead* directs us to presume that the sentencing judge applied the correct level of scrutiny to this probation condition. But even presuming this, we nevertheless conclude that the sentencing judge committed plain error. As we have already noted, it is readily apparent that reasonable, lesser restrictions were available — alternatives such as allowing Powell to have contact with his mother and brother under the supervision of a probation officer or other designated person.

For this reason, we direct the superior court to reconsider this condition of Powell's probation.

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[3] *See also Simants v. State*, 329 P.3d 1033, 1038-39 (Alaska App. 2014); *Dawson v. State*, 894 P.2d 672, 680-01 (Alaska App. 1995).

The judgement of the superior court is AFFIRMED, with the exception that Powell must be re-sentenced, and the superior court must reconsider the condition of Powell's probation that completely forbids him from having contact with his mother and brother.